(5)

No. 89-1749

JUN 11 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FUEL GAS SUPPLY CORPORATION,
Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. McFARLAND, EDWARD M. KRESKY, and HENRY G. WILLIAMS, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE STATE OF NEW YORK,
Defendant-Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF VERMONT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

William Griffin
Assistant Attorney General
State of Vermont
Pavilion Office Building
Montpelier, Vermont 05602
(802) 828-3171

George E. Young
Vermont Department of Public Service
120 State Street
Montpelier, Vermont 05602
(802) 828-2383

William I. Harkaway
*Harvey L. Reiter
Carl M. Fink
McCARTHY, SWEENEY & HARKAWAY, P.C.
1750 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 393-5710

*Counsel of Record

June 11, 1990

ABS Duplicators, Inc. - 912 17th Street, NW, Washington DC 20006 — 298-5537

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1749

NATIONAL FUEL GAS SUPPLY CORPORATION,
Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. McFARLAND, EDWARD M. KRESKY, and HENRY G. WILLIAMS, IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS OF THE STATE OF NEW YORK,
Defendant-Appellees.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF VERMONT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

This brief is filed by the State of Vermont as an *Amicus Curiae* in support of The Public Service Commission of the State of New York's (PSCNY's) May 18, 1990 Petition for Writ of Certiorari to the United States Court of Appeals for the Second

Circuit. PSCNY's petition asks the Court to determine, contrary to the holding by the Second Circuit in the case at bar, *National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York*, 894 F.2d 571 (2nd Cir. 1990), that neither the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (NGA), nor the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (NEPA), preempt states from mollifying the site-specific, local environmental effects of federally certificated interstate pipeline projects. The Second Circuit's decision is in conflict both with the Court's Commerce and Supremacy Clause decisions and with the statement of the Eighth Circuit in *ANR Pipeline Company v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987), that state environmental regulation of interstate pipelines is not a matter which is subject to exclusive Federal jurisdiction nor a matter within which concurrent Federal jurisdiction has been exercised.[1]

Vermont's interest in this proceeding as *Amicus Curiae* is clear. Section 248 of Vermont's statute, 30 V.S.A. § 248, *et seq.*, "New Gas and Electric Purchases, Investments & Facilities; Certificate of Public Good", provides Vermont with

---

[1]In *ANR Pipeline Company v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987), the Court stated that:

> we note that regulations concerning the environmental impact of pipeline construction are not specifically preempted by the language of either the NGPSA [Natural Gas Pipeline Safety Act] or the NGA. Thus, Iowa may be able to enact legislation to protect its valuable topsoil and other aspects of the environment, and to provide private damage remedies, as long as the state regulations do not conflict with existing federal standards. *See Pacific Gas*, 461 U.S. at 216 nl.28.

828 F.2d at 473. In a footnote, the Court went on to note that "although there are a significant number of federal environmental regulations applicable to gas pipelines under the NGA, [citations omitted] certain sections of the regulations appear to anticipate such state regulation." *ANR Pipeline*, 828 F.2d at n.7.

authority generally similar to that provided to New York under portions of New York's Public Service Law Section 121 (N.Y. Pub. Serv. Law § 121 (McKinney 1989)), which the Second Circuit incorrectly found to be preempted by Federal Law. Section 248 of Vermont's statute, like portions of New York Public Service Law § 121, provides Vermont with the authority to protect its citizens from a variety of detrimental impacts of pipeline construction which only arise, and can only be dealt with, at a local level. Amelioration of these impacts, such as prevention of erosion of topsoil, and protection of wildlife habitats and other aspects of the environment, are not at all contemplated by the Federal regulatory scheme, and certainly not preempted.

As Vermont has a clear interest in protecting its citizens in these purely local matters, Vermont supports the PSCNY's petition for certiorari in this proceeding. Vermont adopts PSCNY's statements regarding Parties to the Proceeding, Opinions below, Jurisdiction, Questions Presented, Statutory and Regulatory Provisions Involved, and Statement of the Case.

In this brief, Vermont analyzes the four ways in which state regulation may be preempted by federal legislation. This brief demonstrates that, contrary to the findings of the Court of Appeals for the Second Circuit, none of the four applies under the facts of this case. Most significantly, as explained below, Congress explicitly did *not* intend to preempt State regulation of local issues, and preemption of facially valid state regulation can not be inferred. In light of the legislative history of the Natural Gas Act, 15 U.S.C. § 717, and of the nature of FERC regulations, this Court should grant certiorari in this proceeding to reconsider the Second Circuit's order in this case and should allow the state of New York its proper role in interstate pipeline regulation.

II.

SUMMARY OF ARGUMENT

The Supreme Court has generally recognized four distinct types of Federal preemption over a state's regulatory powers; explicit preemption; implicit preemption; preemption based on duly authorized action of a federal agency, and preemption based on a finding that the state action at issue would necessarily conflict with a federal regulatory scheme. None of these types of preemption exist in the instant case.

Explicit preemption exists where, as in the case of the Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671-1686 (NGPSA) a statute specifically indicates an intent to preempt state law in a given area. Neither the NGPSA, the NEPA, the NGA nor any other federal statute express an intent to preempt state regulation of the type found preempted by the Second Circuit. In fact, the relevant federal statutes appear to contemplate such regulation.

Implicit preemption may exist where the general nature of a federal act indicates Congressional intent to occupy the entire field to the exclusion of state regulation. However, both the legislative history of the NGA and subsequent court interpretation of that Act indicate that the NGA was not intended to "occupy the field", but rather was drafted in a way that was "meticulous to take in only territory which this court had held the states could not reach." *Panhandle Co. v. Michigan Commission*, 341 U.S. 329, 335 (1951). The state regulation at issue here is exactly the type of local regulation which the NGA was not designed to address.

Preemption may also be based on the duly authorized action of a federal agency. However, the Supreme Court has made it abundantly clear that such preemption only should be found where the agency has "declare[d] any intention to preempt state

law with some specificity." *California Coastal Comm'n v. Granite Rock Corp.*, 480 U.S. 572, 107 S. Ct. 1419, 1426 (1987). In this case, the Federal Energy Regulatory Commission (FERC) has not in any way indicated an intent to preempt the state regulation at issue here. In fact, the FERC explicitly required National Fuel to obtain local permits and declined a specific invitation to intervene in the proceedings below.

The final type of preemption addressed by this brief occurs where state action would necessarily conflict with the federal regulatory scheme. That is not the case here; rather, the regulatory scheme at issue contemplates state and local involvement and regulation of the type addressed by the New York statute at issue.

III.

ARGUMENT

Standards For Preemption

The principles of preemption law have been set out by this Court in many cases. In every instance, "[t]he critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986). A typical statement of the indicia of that intent is set out in the same case:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated

> comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. (*Citations omitted.*)

Id. at 368. Preemption is not to be favored, and a court should presume that state law is to be given effect unless the opposite is demonstrated by federal legislation or duly delegated regulatory action. *Chicago and N.W. Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

A. EXPLICIT PREEMPTION

Congress may express its intent to preempt state regulatory action in clear statutory language. For example, the Natural Gas Pipeline Safety Act, 49 U.S.C. Sections 1671-1686 (NGPSA), expressly preempts the states from adopting any safety standards on interstate pipelines, whether more, less, or equally stringent as the federal standards. Safety standards for intrastate pipelines, on the other hand, are explicitly left for the states to regulate, so long as the state standards are not incompatible with the federal standards. 49 U.S.C. Section 1672(a)(1). States are permitted to act as agents for the federal government in inspecting pipelines and monitoring compliance with the federal standards. When the State of Iowa attempted to require a state safety permit for pipeline construction, using state safety standards that were identical to the federal standards, the permit requirement was struck down because of *explicit* language in the NGPSA. *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8th Cir. 1987). The court stated that the explicit preemption in the statute and the com-

prehensive regulatory scheme forbade not only substantive state legislation, but also state decision-making in the field of interstate gas pipeline safety. *Id.* at 472. However, aside from safety criteria, the NGPSA clearly has no preemptive effect over state regulation of interstate pipelines,[2] and no other federal statute contains language which could be read as explicitly preempting the state regulations at issue. In fact, as the *ANR* court specifically noted in passing, it appears that states retain the authority to regulate pipelines in regard to environmental and land-use concerns and protection of agricultural land. *Id.* at 473.

B. IMPLICIT PREEMPTION

In sharp contrast to the NGPSA, the NGA contains no explicit language preempting state review. Instead, National Fuel argues that preemption should be inferred from the general nature of the Act and from the alleged state regulatory conflict with a number of its specific provisions. In weighing that argument, this Court should consider its recent interpretation of the NGA in *Northwest Central Pipeline v. Kansas State Corporation Comm.*, 489 U.S. 493, 109 S.Ct. 1262 (1989). The Court held that concepts of conflict preemption 'must be applied sensitively in this area [natural gas production, transportation, and rates] so as to prevent the diminution of the role

---

[2]Deliberate congressional preemption as to one set of concerns need not imply preemption of alternative state concerns, even if those alternate state concerns have direct effects upon federal goals. *See, e.g. Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983) (upholding state pre-construction approval of nuclear plants on economic grounds, despite federal licensing provisions re safety criteria); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48 (2nd Cir., 1988) (in order to avoid preemption, a local government must demonstrate only that there is a legitimate and substantive purpose apart from protecting asbestos workers); *Northwest Central Pipeline*, 489 U.S. 493, 109 S.Ct. 1262 (1989) (upholding state regulation despite direct impacts on rates and natural gas wholesale prices).

Congress reserved to the States, while at the same time preserving the federal role." 109 S.Ct. 1262 at 1276. The Court ruled in that case that a state regulation governing natural gas proration was not preempted by federal law even though the state regulation did have a direct impact on the purchasing decisions and costs of interstate pipelines. 109 S.Ct. 1262 at 1282.

The NGA does require a certificate of public convenience and necessity; however, that requirement is contained in two short subsections, 15 U.S.C. Sections 717f(c)(1) and (e), which do no more than to impose the certification and require a pipeline company to comply with the regulations of FERC.

Unlike the situation in *California v. FERC*, 58 U.S.L.W. 4991 (May 21, 1990), recently decided by this Court, where the comprehensive federal regulatory regime governing the licensing of hydroelectric projects was found to preempt conflicting state regulation, the regulations at issue are primarily of local concern and not addressed by the federal regulatory scheme. As the court noted in *California v. FERC*, there is a "presumption against finding preemption of state law in areas traditionally regulated by the states", as well as an "assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest intent of Congress." *California v. FERC*, Slip Op. at 5.[3] And, unlike the Federal Power Act's hydroelectric licening provisions, which "expressly direct that FERC consider a project's effect on fish and wildlife as well as 'power and development' purposes'", *Id.* at 2, the NGA certification requirements are more broadly directed toward promoting and protecting the "public convenience and necessity", 15 U.S.C. § 717f(c). Terms such as "public convenience and necessity"

[3]Even in that case, the Court acknowledged the "tension" between its decision and its other federal preemption precedents (Slip Op. at 11), the former being influenced heavily by *stare decisis*. *Id.* at 6.

and "public interest", found in a regulatory statute, are not unbounded phrases, but derive their meaning from the underlying purposes of the legislation, *NAACP v. FPC*, 425 U.S. 662, 669 (1976). In the use of these terms in the NGA, Congress' intent was to protect consumers against "exploitation at the hands of natural gas companies", *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944), not to foreclose state regulation to protect local environmental concerns.

At the time the NGA was under consideration by Congress, the Supreme Court had ruled[4] that states could not control wholesale resale of gas in interstate commerce because of conflicts with the Commerce Clause of the U.S. constitution,[5] and that such control could only be exercised by Congress.[6] Therefore, bills were introduced in 1935, 1936, and 1937 to regulate various aspects of the interstate gas industry. The 1935 bill[7] contained three titles: Title I was eventually passed as the Public Utility Holding Company Act of 1935;[8] Title II was passed as the Federal Power Act of 1935;[9] but Title III, the natural gas title, was not reported with the others. The 1936 bill[10] was reported out but not passed. The 1937 bill,[11] essentially identical to the 1936 bill, was passed as the Natural Gas Act. The legislative history makes clear that the NGA was conceived as a gap-filling statute, needed because the states were

---

[4]*Peoples Natural Gas Co. v. Public Serv. Comm'n*, 270 U.S. 550 (1926); *Missouri ex. rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Public Util. Comm'n v. Landon*, 249 U.S. 236 (1919); *The Pipe Line Cases*, 234 U.S. 548 (1914); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

[5]U.S. Const. Art. I, Section 10.

[6] *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924).

[7]H.R. 5423, 74th Cong., 1st Sess., 70 Cong. Rec. 1624 (1935).

[8]15 U.S.C. §§ 79-79z-6 (1952).

[9]16 U.S.C. §§ 791a-825r (1952)

[10]H.R. 12680.

[11]H.R. 6586, 75th Cong., 1st Sess.

helpless to control monopolistic interstate wholesalers. The report of the House Committee on Interstate and Foreign Commerce on the 1936 bill stated:

> The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense a usurpation, of State regulatory authority . . . . Your committee believes this legislation useful and very desirable to fill the gap in regulation that now exists by reason of the lack of authority in the State commissions over interstate transportation.[12]

Likewise, the Committee report of the 1937 bill stated:

> There is no intention in enacting the present legislation to disturb the States in their exercise of such [local] jurisdiction. However, in the case of sales for resale . . . in intertstate commerce . . . [s]uch transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. . . . The basic purpose of the present legislation is to occupy this field [wholesale interstate natural gas sales] in which the Supreme Court has held that the states may not act.[13]

In sum, the legislative history of the NGA confirms that the NGA was not intended to regulate the natural gas industry to the exclusion of state regulation. *Interstate Natural Gas v. FPC*, 331 U.S. 682, 690 (1947).

The division between state and federal jurisdictions, as determined by Congress, was discussed in *Panhandle Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951):

---

[12]H.R. Rep. No. 2651, 74th Cong., 2d Sess., 1, 2-3 (1936).

[13]H.R. Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937).

> It would be an exceedingly incongruous result if a state so motivated, designed and shaped to bring effective state regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what the appellant asks us to do. For the essence of its position . . . is that Congress by enacting the Natural Gas Act has 'occupied the field,' i.e., the entire field open to federal regulation. . . . The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach.[14]

The court went on to describe the regulatory scheme as the "comprehensive and effective *dual* regulation Congress had in mind."[15] As Justice Frankfurter noted in dissent, *Panhandle* involved "the clearest kind of interstate commerce" and did not involve the utility's "desire to lay pipes in the public highways of Michigan and the power of Michigan to make exactions for such privileges so long as it does not offend the doctrine of unconstitutional conditions."[16]

The question then must be asked, what regulatory authority did the states have, prior to the passage of the NGA, to regulate the construction or operation of pipelines within their territories, whether in inter- or intrastate commerce? The parameters of the states' authority, in the context of railroad regulation, were explored in detail in the *Minnesota Rate Cases*, 230 U.S. 352 (1913), a quarter century before the passage of the NGA.

---

[14] *Id.* at 335.

[15] *Id.* at 336 (emphasis added).

[16] *Id.* at 337.

> [I]t is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved.[17]

Environmental concerns and land-use planning and regulation are now expressed in a vocabulary that was not fashionable a century ago. However, they reflect the very "health, safety, morals, and welfare of its people" that the *Minnesota Rate Cases* found the states had authority to protect. Many more recent cases reach essentially the same point.[18] Construction review by the States is not forbidden by federal statute or the federal Constitution and the states retain, undisturbed, considerable local control over pipeline construction within their borders.

C. AGENCY PREEMPTION

Preemption can also be based upon the duly authorized action of a federal agency, either through a preemptive statement or a pervasive set of regulations that demonstrate an intent to fully occupy a relavant field. Existing FERC regulations suggest neither an express nor an implied intent to pervasively occupy the field in regard to construction of new pipelines. Most

---

[17] *Id.* at 402.

[18] *See, e.g., California Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987), (upholding state environmental regulations of mines with federal permits operating within National Forests); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding state law creating tort liability for oil spills, despite a similar, non-exclusive congressional grant of federal maritime and admiralty jurisdiction; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (upholding local air quality regulation of ships with federal licenses).

importantly, they specifically require compliance with applicable state and local permits — quite the opposite from evincing an intent to preempt such requirements. Moreover, there are specific state concerns that are not addressed by FERC in its regulations and thus in its certification process. For example, FERC regulations do not require that an applicant demonstrate the absence of undue environmental degradation in order to receive a certificate. This is precisely the sort of concern that is not preempted by the federal scheme.

Thus, this regulatory structure is very different from that reviewed in *California v. FERC, supra,* or *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145 (1988). There, the Supreme Court specifically relied upon the precise, detailed, and explicit federal regulations that were designed to achieve the goals addressed by the relevant state laws. No such set of regulations exists in regard to FERC's review of proposed pipeline facilities.

The Supreme Court has recently explained that, if a federal agency intends its regulations to preempt state law, "[I]t is appropriate to expect an administrative agency to declare any intention to preempt state law with some specificity:

> [B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 107 S.Ct. 1419, 1426 (1987), quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718

(1985). Nothing in the FERC regulations purports to oust the state from all jurisdiction over the construction of a proposed interstate gas pipeline. Further, the FERC's own interpretation of its regulations, as evidenced by its action in this case, are particularly instructive: the record indicates that the FERC explicitly required Natural Fuel to obtain applicable local permits and explicitly declined an invitation to intervene in this proceeding.

D. CONFLICT WITH THE FEDERAL SCHEME

Courts may also hold state regulation preempted where Congress, or an agency properly authorized by Congress, has occupied a field of regulation, and state action would necessarily conflict with the federal regulatory scheme. However, the NGA does not clearly imply any federal need to create a uniform national system on all aspects of gas pipeline construction, and the legislative history of the NGA[19] indicates that Congress did not intend to oust the states from the field.

Preemption by actual conflict can only apply after an inconsistent result is reached by state and federal authorities. National Fuel's challenge to state jurisdiction, as upheld by the Second Circuit, is a facial challenge; such a challenge is sustainable only if the federal regulatory regime so clearly excludes concurrent state review that there is no possible factual circumstance in which the state law could be lawfully applied. As the Supreme Court has observed, a general federal purpose to encourage a particularly activity does not preempt state regulation which incidentally prohibits that activity in an area where the state regulation is not otherwise prohibited. *California Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987);

---

[19]See discussion, *supra*, at 9-11.

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

In reality, the federal and state regulatory programs at issue here are compatible. The FERC regulations clearly contemplate state and local involvement in permitting and land-use planning; the regulations under NEPA are especially suggestive of a state role in environmental control. See FERC regulations Sections 2.69(a), 2.69(a)(1)(xiii), 2.69(a)(3), 157.14, 380.3(a)(3)&(4), and guidelines pursuant to 380.3 numbers 9.1, 9.2, 9.3, and 10.2.1. The FERC-NEPA regulations and guidelines, Sections 80 *et seq.*, are generally directed at instructing the applicant on issues to be examined in the application. Implicit in them is that FERC will consider those issues in preparation of its Environmental Impact Statement. Neither explicit nor implicit, however, is the intent that *only* FERC may consider those issues.

As discussed, the record in this case demonstrates both (1) that FERC explicitly contemplated state review of "stream crossing and road crossing permits" (A. 38) and (2) that FERC declined National Fuel Gas' request to intervene in this proceeding. Thus, hypothesis about actual conflict with federal purposes are not merely speculative, but actually contrary to the record below.

IV.

CONCLUSION

For all the foregoing reasons, Vermont asks that the Court grant NYPSC's petition for Writ of Certiorari.

Respectfully submitted,

VERMONT DEPARTMENT
OF PUBLIC SERVICE

William Griffin
Assistant Attorney General
State of Vermont
Pavilion Office Building
Montpelier, Vermont 05602
(802) 828-3171

George E. Young
Vermont Department of
Public Service
120 State Street
Montpelier, Vermont 05602
(802) 828-2383

William I. Harkaway
*Harvey L. Reiter
Carl M. Fink
McCARTHY, SWEENEY
& HARKAWAY, P.C.
1750 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 393-5710

*Counsel of Record

June 11, 1990